

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

<b>STATE OF OKLAHOMA,</b>	)	
	)	
<b>Plaintiff,</b>	)	
	)	
<b>v.</b>	)	<b>Case No. 05-cv-329-GKF(SAJ)</b>
	)	
<b>TYSON FOODS, INC., et al.,</b>	)	
	)	
<b>Defendants.</b>	)	

**STATE OF OKLAHOMA'S REPLY IN FURTHER SUPPORT OF ITS MOTION  
FOR A STATUS CONFERENCE REGARDING MATTERS PERTAINING  
TO THE STATE'S MOTION FOR PRELIMINARY INJUNCTION [DKT # 1465]**

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State"), hereby submits this reply in further support of its Motion for a Status Conference Regarding Matters Pertaining to Its Motion for Preliminary Injunction [DKT #1465].

Defendants spend much of their Response [DKT #1478]<sup>1</sup> complaining that it would be unfair to subject their own experts to deposition, unfair to disclose their experts' opinions and materials on the day their response to the Motion for Preliminary Injunction is due, and unfair for the State's experts to continue review of materials pertaining to topics to be covered at the preliminary injunction hearing. What Defendants do not admit, however, is that it would be far more "unfair" to not provide these basic due process rights to the State. The State should not be ambushed by Defendants' expert opinions. In fact, the State has not yet seen Defendants' experts' opinions. On the other hand, the State disclosed its expert opinions in November 2007, and soon

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<sup>1</sup> Defendants' Response was not filed within the time period ordered by the Court. See DKT #1467.

thereafter proffered its experts and their materials for examination at dates of Defendants' choosing. Defendants do not seek "fairness," but rather an unfair advantage. This should not be permitted and the relief sought by State should be granted.

**A. The State is entitled to take the depositions of the experts upon which Defendants intend to rely at the Preliminary Injunction hearing**

A review of the December 7, 2007 transcript reveals that, contrary to Defendants' suggestion, the Court did not rule that the State could not take the depositions of the experts upon which Defendants intend to rely at the Preliminary Injunction hearing. In their Response, Defendants offer no cogent reason why the State should not have this basic right to question Defendants' experts before the hearing. Indeed, it is mystifying why Defendants would refuse to put their expert witnesses up for deposition the week of February 11, 2008. There currently are no depositions scheduled for that week.<sup>2</sup> The docket reflects that Defendants have more than 40 attorneys working on this case. Surely, Defendants can spare one of these attorneys to defend the depositions of their experts.

The only conclusion that can be drawn from Defendants' refusal is that Defendants do not want the State to know anything more about Defendants experts, other than the information that Defendants choose to disclose in their expert reports. Plainly, Defendants are not seeking fairness -- they are seeking a tactical advantage. They want to know everything about the State's experts, but do not want the State to know much about their experts. Defendants' complaints about the difficulties of the State's experts pale in comparison to the difficulties faced by the State without any depositions of Defendants' experts. Notions of fairness and basic due process

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<sup>2</sup> Judge Frizzell contemplated depositions of the State's experts would occur up to start of the preliminary injunction. *See* Dec. 7, 2007 Transcript, 48:15-20. Given that the depositions of the State's experts will be completed by February 5, 2008, there is absolutely no reason not to put this time to productive use in deposing Defendants' experts.

strongly favor the State's position. The noticed depositions should go forward beginning on February 12, 2008.

**B. Defendants should be required to disclose their expert opinions and materials considered on the same day -- February 8, 2008 -- on which the Court has ordered them to file their response to the State's Motion for Preliminary Injunction**

This Court ordered Defendants to respond to the State's Motion for Preliminary Injunction on February 8, 2008. *See* Dec. 7, 2007 Transcript, 48:22-49:3. The Court stated:

THE COURT: And I only need enough time to actually have a chance to read and try to absorb the filings on both sides. And that really needs to be done, given the volume of materials that tend to be produced here, it would seem to me that, I don't know, February 8th, how would that be?

MR GEORGE: That would be acceptable, Your Honor. I think that's a fair approach.

Implicit in this Order is that all expert opinions and materials considered would be disclosed on February 8, 2008. *See id.* Defendants now, however, have unilaterally taken the improper position that they are entitled to hold back disclosure of their expert opinions and materials considered until February 12, 2008. This is not only contrary to the Court's order, but also fundamentally unfair to the State in its preliminary injunction preparations. Defendants have known for more than two and a half years that the State was alleging a bacterial injury, and has had all that time to prepare its defense to that allegation. Moreover, they have had the State's preliminary injunction expert affidavits for nearly two and half months. They should not be permitted to hide their defense to the State's allegations until the eleventh hour. Defendants should be required to disclose all of their expert opinions and materials considered on February 8, 2008.

**C. Defendants' position that the State's experts cannot continue to review materials pertaining to topics to be covered at the preliminary injunction hearing is untenable**

Defendants complain that the State's experts are continuing to review materials pertaining to topics to be covered at the preliminary injunction hearing. Defendants' complaint is unfounded for at least five reasons. First, the affidavits included in the State's Motion for Preliminary Injunction were not all-inclusive Rule 26 expert reports,<sup>3</sup> *see Seattle Audubon Society v. Sutherland*, 2007 WL 1655152, \*1 (W.D. Wash. June 5, 2007) ("Rule 26(a)(2)(C) is inapplicable here, where the parties are not preparing for trial, but for a preliminary injunction hearing"). Second, a preliminary injunction proceeding is by its very nature "preliminary" and contemplates a developing evidentiary record, *see, e.g., Midwest Guaranty Bank v. Guaranty Bank*, 270 F.Supp.2d 900, 917-18 (E.D. Mich. 2003) ("Before the Court is Midwest Guaranty's motion for preliminary injunction. Such a motion is heard on an expedited basis, with a record that is continuously developing. The need to continuously supplement the record is obvious . . ."). Third, the topics to be covered at the preliminary injunction hearing are a subset of the topics to be covered in the State's main case, and therefore the State's experts must continue to review pertinent materials in order to prepare for the disclosure of their Rule 26 expert reports on April 1, 2008.<sup>4</sup> Fourth, the State has in fact made timely and good faith productions of the various

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<sup>3</sup> This Court's December 26, 2007 Order [DKT # 1425] addressed solely what expert materials needed to be disclosed and the timing of those disclosures. It (quite correctly) did not require disclosure of Rule 26 expert reports in connection with the preliminary injunction.

<sup>4</sup> That Defendants' complaint is make-weight is highlighted by the fact that if the State had not disclosed this fact, the State suspects that Defendants would be complaining even more loudly.

experts' disclosure materials.<sup>5</sup> And fifth, to the extent review of these additional materials were to cause an expert to actually change his or her opinion -- something that has not occurred -- the State would of course timely disclose this fact to Defendants. The simple fact of the matter is that the Court, in determining the State's Motion for Preliminary Injunction, is entitled to the most complete, most robust factual record available. That Defendants apparently seek to deprive the Court of such a record is telling.

**D. The disclosure of witness lists, exhibit lists and page-line designations should be contemporaneous, not staggered**

Simultaneous disclosure of witness lists and exhibit lists is consistent with traditional trial practice and the Amended Scheduling Order. In their Response, Defendants offer no valid justification for departing from this norm. In fact, the justification offered by Defendants is disingenuous in the extreme. They actually assert that they "at present have no idea what facts Plaintiffs [sic] intend to prove at the hearing." *See* Response, p. 7. The facts the State must prove are dictated by RCRA itself. In its Motion for Preliminary Injunction, the State outlined the facts it intends to prove. For Defendants to now make such a claim is simply not believable. The disclosure of witness lists, exhibit lists and page-line designations should be contemporaneous, and should occur on February 12, 2008.

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<sup>5</sup> Materials produced after the 21-day disclosure deadline have generally been materials that were subsequently reviewed, considered or generated by the experts. These materials would include (1) published literature reviewed by the expert that relates to their opinions; (2) data produced by Defendants; (3) recent sampling and analysis that the State has performed; and (4) data that the experts have obtained from third parties that relates to their opinions. These materials have, of course, been seasonably produced to Defendants.

### Conclusion

Wherefore, the positions set forth in the State's Motion for a Status Conference Regarding Matters Pertaining to Its Motion for Preliminary Injunction [DKT #1465] should be adopted and incorporated into an Order.

Respectfully submitted,

W.A. Drew Edmondson OBA # 2628  
Attorney General  
Kelly H. Burch OBA #17067  
J. Trevor Hammons OBA #20234  
Tina Lynn Izadi OBA #17978  
Assistant Attorneys General  
State of Oklahoma  
313 N.E. 21<sup>st</sup> St.  
Oklahoma City, OK 73105  
(405) 521-3921

M. David Riggs OBA #7583  
Joseph P. Lennart OBA #5371  
Richard T. Garren OBA #3253  
Douglas A. Wilson OBA #13128  
Sharon K. Weaver OBA #19010  
Robert A. Nance OBA #6581  
D. Sharon Gentry OBA #15641  
David P. Page, OBA #6852  
Riggs, Abney, Neal, Turpen,  
Orbison & Lewis  
502 West Sixth Street  
Tulsa, OK 74119  
(918) 587-3161

/s/ Louis W. Bullock

Louis W. Bullock, OBA #1305  
Bullock Bullock & Blakemore  
110 West 7<sup>th</sup> Street, Suite 707  
Tulsa, OK 74119-1031  
(918) 584-2001

Frederick C. Baker (admitted *pro hac vice*)  
Lee M. Heath (admitted *pro hac vice*)

Elizabeth C. Ward (admitted *pro hac vice*)  
Elizabeth Claire Xidis (admitted *phv*)  
Motley Rice, LLC  
28 Bridgeside Boulevard  
Mount Pleasant, SC 29465  
(843) 216-9280

William H. Narwold (admitted *pro hac vice*)  
Ingrid L. Moll (admitted *pro hac vice*)  
Motley Rice, LLC  
20 Church Street, 17<sup>th</sup> Floor  
Hartford, CT 06103  
(860) 882-1676

Jonathan D. Orent (admitted *pro hac vice*)  
Michael G. Rousseau (admitted *phv*)  
Fidelma L. Fitzpatrick  
Motley Rice, LLC  
321 South Main Street  
Providence, RI 02940  
(401) 457-7700

**Attorneys for the State of Oklahoma**

## CERTIFICATE OF SERVICE

I certify that on the 30<sup>th</sup> day of January, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W.A. Drew Edmondson, Attorney General	<a href="mailto:fc_docket@oag.ok.gov">fc_docket@oag.ok.gov</a>
Kelly Hunter Burch, Assistant Attorney General	<a href="mailto:kelly.burch@oag.ok.gov">kelly.burch@oag.ok.gov</a>
J. Trevor Hammons, Assistant Attorney General	<a href="mailto:trevor.hammons@oag.ok.gov">trevor.hammons@oag.ok.gov</a>
Tina L. Izadi, Assistant Attorney General	<a href="mailto:tina.izadi@oag.ok.gov">tina.izadi@oag.ok.gov</a>
Daniel P. Lennington, Assistant Attorney General	<a href="mailto:daniel.lennington@oag.ok.gov">daniel.lennington@oag.ok.gov</a>
M. David Riggs	<a href="mailto:driggs@riggsabney.com">driggs@riggsabney.com</a>
Joseph P. Lennart	<a href="mailto:jlennart@riggsabney.com">jlennart@riggsabney.com</a>
Richard T. Garren	<a href="mailto:rgarren@riggsabney.com">rgarren@riggsabney.com</a>
Douglas A. Wilson	<a href="mailto:dwilson@riggsabney.com">dwilson@riggsabney.com</a>
Sharon K. Weaver	<a href="mailto:sweaver@riggsabney.com">sweaver@riggsabney.com</a>
Robert A. Nance	<a href="mailto:rnance@riggsabney.com">rnance@riggsabney.com</a>
D. Sharon Gentry	<a href="mailto:sgentry@riggsabney.com">sgentry@riggsabney.com</a>
David P. Page	<a href="mailto:dpage@riggsabney.com">dpage@riggsabney.com</a>
RIGGS ABNEY NEAL TURPEN ORBISON & LEWIS	
Frederick C. Baker	<a href="mailto:fbaker@motleyrice.com">fbaker@motleyrice.com</a>
Lee M. Heath	<a href="mailto:lheath@motleyrice.com">lheath@motleyrice.com</a>
William H. Narwold	<a href="mailto:bnarwold@motleyrice.com">bnarwold@motleyrice.com</a>
Elizabeth Claire Xidis	<a href="mailto:lward@motleyrice.com">lward@motleyrice.com</a>
Ingrid L. Moll	<a href="mailto:cxidis@motleyrice.com">cxidis@motleyrice.com</a>
Jonathan D. Orent	<a href="mailto:imoll@motleyrice.com">imoll@motleyrice.com</a>
Michael G. Rousseau	<a href="mailto:mrousseau@motleyrice.com">mrousseau@motleyrice.com</a>
Fidelma L. Fitzpatrick	<a href="mailto:ffitzpatrick@motleyrice.com">ffitzpatrick@motleyrice.com</a>
MOTLEY RICE, LLC	
<b>COUNSEL FOR PLAINTIFFS STATE OF OKLAHOMA</b>	
Robert P. Redemann	<a href="mailto:rredemann@pmrlaw.net">rredemann@pmrlaw.net</a>
Lawrence W. Zeringue	<a href="mailto:lzingue@pmrlaw.net">lzingue@pmrlaw.net</a>
David C. Senger	<a href="mailto:dsenger@pmrlaw.net">dsenger@pmrlaw.net</a>
PERRINE, McGI VERN, REDEMANN, REID, BERRY & TAYLOR, PLLC	
Robert E. Sanders	<a href="mailto:rsanders@youngwilliams.com">rsanders@youngwilliams.com</a>



E.Stephen Williams	<a href="mailto:steve.williams@youngwilliams.com">steve.williams@youngwilliams.com</a>
YOUNG WILLIAMS	
<b>COUNSEL FOR DEFENDANT CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.</b>	
John H. Tucker	<a href="mailto:jtucker@rhodesokla.com">jtucker@rhodesokla.com</a>
Colin H. Tucker	<a href="mailto:chtucker@rhodesokla.com">chtucker@rhodesokla.com</a>
Theresa Noble Hill	<a href="mailto:thill@rhodesokla.com">thill@rhodesokla.com</a>
Leslie Jane Southerland	<a href="mailto:ljsoutherland@rhodesokla.com">ljsoutherland@rhodesokla.com</a>
RHODES, HIERONYMUS, JONES, TUCKER & GABLE	
Terry W. West	<a href="mailto:terry@thewestlawfirm.com">terry@thewestlawfirm.com</a>
THE WEST LAW FIRM	
Delmar R. Ehrich	<a href="mailto:dehrich@faegre.com">dehrich@faegre.com</a>
Bruce Jones	<a href="mailto:bjones@faegre.com">bjones@faegre.com</a>
Krisann C. Kleibacker Lee	<a href="mailto:kklee@faegre.com">kklee@faegre.com</a>
Dara D. Mann	<a href="mailto:dmann@faegre.com">dmann@faegre.com</a>
Todd P. Walker	<a href="mailto:twalker@faegre.com">twalker@faegre.com</a>
FAEGRE & BENSON LLP	
<b>COUNSEL FOR DEFENDANT CARGILL, INC. and CARGILL TURKEY PRODUCTION, LLC</b>	
George W. Owens	<a href="mailto:gwo@owenslawfirm.com">gwo@owenslawfirm.com</a>
Randall E. Rose	<a href="mailto:rer@owenslawfirm.com">rer@owenslawfirm.com</a>
OWENS LAW FIRM, P.C.	
James M. Graves	<a href="mailto:jgraves@bassettlawfirm.com">jgraves@bassettlawfirm.com</a>
Gary V. Weeks	<a href="mailto:gweeks@bassettlawfirm.com">gweeks@bassettlawfirm.com</a>
BASSETT LAW FIRM	
<b>COUNSEL FOR DEFENDANT GEORGE'S INC. AND GEORGE'S FARMS, INC.</b>	
A. Scott McDaniel	<a href="mailto:smcdaniel@mhla-law.com">smcdaniel@mhla-law.com</a>
Nicole Longwell	<a href="mailto:nlongwell@mhla-law.com">nlongwell@mhla-law.com</a>
Philip D. Hixon	<a href="mailto:phixon@mhla-law.com">phixon@mhla-law.com</a>
Craig A. Mirkes	<a href="mailto:cmirkes@mhla-law.com">cmirkes@mhla-law.com</a>
McDANIEL HIXON LONGWELL & ACORD, PLLC	]
Sherry P. Bartley	<a href="mailto:sbartley@mwsgr.com">sbartley@mwsgr.com</a>
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC	
<b>COUNSEL FOR DEFENDANT PETERSON FARMS, INC.</b>	

John R. Elrod	<a href="mailto:jelrod@cwlaw.com">jelrod@cwlaw.com</a>
Vicki Bronson	<a href="mailto:vbronson@cwlaw.com">vbronson@cwlaw.com</a>
Bruce W. Freeman	<a href="mailto:bfreeman@cwlaw.com">bfreeman@cwlaw.com</a>
CONNER & WINTERS, LLP	
<b>COUNSEL FOR DEFENDANT SIMMONS FOODS, INC.</b>	
Robert W. George	<a href="mailto:robert.george@kutakrock.com">robert.george@kutakrock.com</a>
Michael R. Bond	<a href="mailto:michael.bond@kutakrock.com">michael.bond@kutakrock.com</a>
Erin W. Thompson	<a href="mailto:erin.thompson@kutakrock.com">erin.thompson@kutakrock.com</a>
KUTAK ROCK LLP	
Stephen Jantzen	<a href="mailto:sjantzen@ryanwhaley.com">sjantzen@ryanwhaley.com</a>
Paula Buchwald	<a href="mailto:pbuchwald@ryanwhaley.com">pbuchwald@ryanwhaley.com</a>
Patrick M. Ryan	<a href="mailto:pryan@ryanwhaley.com">pryan@ryanwhaley.com</a>
RYAN, WHALEY & COLDIRON	
Thomas C. Green	<a href="mailto:tgreen@sidley.com">tgreen@sidley.com</a>
Mark D. Hopson	<a href="mailto:mhopson@sidley.com">mhopson@sidley.com</a>
Timothy Webster	<a href="mailto:twebster@sidley.com">twebster@sidley.com</a>
Jay T. Jorgensen	<a href="mailto:jjorgensen@sidley.com">jjorgensen@sidley.com</a>
SIDLEY AUSTIN LLP	
<b>COUNSEL FOR DEFENDANTS TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC., and COBB-VANTRESS, INC.</b>	
R. Thomas Lay	<a href="mailto:rtl@kiralaw.com">rtl@kiralaw.com</a>
KERR, IRVINE, RHODES & ABLES	
Jennifer S. Griffin	<a href="mailto:jgriffin@lathropgage.com">jgriffin@lathropgage.com</a>
David G. Brown	<a href="mailto:dbrown@lathropgage.com">dbrown@lathropgage.com</a>
LATHROP & GAGE, L.C.	
<b>COUNSEL FOR DEFENDANT WILLOW BROOK FOODS, INC.</b>	
Robin S. Conrad	<a href="mailto:rconrad@uschamber.com">rconrad@uschamber.com</a>
NATIONAL CHAMBER LITIGATION CENTER	
Gary S. Chilton	<a href="mailto:gchilton@hcdattorneys.com">gchilton@hcdattorneys.com</a>
HOLLADAY, CHILTON AND DEGIUSTI, PLLC	
<b>COUNSEL FOR US CHAMBER OF COMMERCE AND AMERICAN TORT REFORM ASSOCIATION</b>	
D. Kenyon Williams, jr.	<a href="mailto:kwilliams@hallestill.com">kwilliams@hallestill.com</a>

Michael D. Graves	<a href="mailto:mgraves@hallestill.com">mgraves@hallestill.com</a>
HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON	
<b>COUNSEL FOR POULTRY GROWERS / INTERESTED PARTIES / POULTRY PARTNERS, INC.</b>	
Richard Ford	<a href="mailto:richard.ford@crowedunlevy.com">richard.ford@crowedunlevy.com</a>
LeAnne Burnett	<a href="mailto:leanne.burnett@crowedunlevey.com">leanne.burnett@crowedunlevey.com</a>
CROWE & DUNLEVY	
<b>COUNSEL FOR OKLAHOMA FARM BUREAU, INC.</b>	
Kendra A. Jones, Assistant Attorney General	<a href="mailto:kendra.jones@arkansasag.gov">kendra.jones@arkansasag.gov</a>
Charles L. Moulton, Sr. Ass't Attorney General	<a href="mailto:charles.moulton@arkansasag.gov">charles.moulton@arkansasag.gov</a>
<b>COUNSEL FOR STATE OF ARKANSAS</b>	

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

C. Miles Tolbert  
Secretary of the Environment  
State of Oklahoma  
3800 North Classen  
Oklahoma City OK 73118  
COUNSEL FOR PLAINTIFFS

s/ Louis W. Bullock \_\_\_\_\_  
Louis W. Bullock